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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re N.B., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

N.B.,

Defendant and Appellant.

A152417

(San Francisco City & County
Super. Ct. No. JW136331)

Defendant N.B. admitted allegations in a juvenile wardship petition that he committed assault by means likely to cause great bodily harm (Pen. Code, § 254, subd. (a)(4))¹; maimed or abused an animal (§ 597, subd. (a)); assaulted a police officer with force likely to cause great bodily harm (§ 254, subd. (c)); possessed a firearm (§ 29610); and escaped from arrest (§ 836.6, subd. (b)). The court committed N.B. to the Division of Juvenile Justice (DJJ) with a maximum 11-year confinement. On appeal, N.B. contends that the court abused its discretion by committing him to the DJJ because the evidence did not show the commitment would result in a probable benefit to him or that less restrictive alternatives were inappropriate. He also argues that the court prejudicially abused its discretion by shackling him at the disposition hearing. We affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTS AND PROCEDURAL BACKGROUND

I. The Prior Juvenile Wardship Petitions and Placements

The San Francisco District Attorney filed a juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)) against N.B. when he was 15 for carrying a loaded, concealed firearm on a public bus. N.B. admitted to one count of carrying a concealed firearm within a vehicle (§ 25400, subd. (a)(3)), and the other counts against him were dismissed. The court placed N.B. in the Excell Center Program. He initially performed well but was later expelled for premeditating a group attack on a resident. The court then placed N.B. in the Pacific Lodge Boys Home, and he fled less than a month later. Approximately six months later, N.B. was captured and sent to another out-of-home program from which he again escaped.

Two months thereafter, the police responded to a call reporting a suspect with a gun at the motel where N.B. lived. N.B. fled when police spotted him near the motel, police gave chase, and police cornered him in the closet of a residence he had broken into. When N.B. refused to come out, police released a police dog, which bit N.B. The district attorney filed a supplemental juvenile wardship petition against N.B. for vandalism and resisting arrest. N.B. admitted to one count of vandalism, and the district attorney dismissed the remaining counts. The court placed N.B. in San Francisco's Log Cabin youth facility where he remained for four months before attempting to escape. N.B. was sent back to the San Francisco Juvenile Justice Center (JJC), and the court then placed him in the Courage to Change program. He escaped this placement the following month.

II. The 2016 Juvenile Wardship Petition

In April 2016, N.B. encountered a transgender woman on his way to the communal shower at a motel, where they both resided. He suggested they shower together, but the woman declined. After the woman showered, she exited in a towel to the hallway. N.B. told her in the hallway that he wanted to have sex with her, and she replied that she was "trans." N.B. tore her towel off, punched her several times in the face, and stole her purse.

The next month, N.B. got into an argument with his brother, and when his brother's dog growled, N.B. shot the dog in the leg. A couple of days later, police spotted N.B. speeding and recognized him from police crime bulletins. N.B. exited his car, refused the police's instruction to stop, ran, and hid behind a vending machine in an ice cream store. The officers followed and tackled N.B. when he charged them. While on the ground, N.B. tried to hide a handgun in the store just prior to his arrest. While in transit to the JJC after his arrest, N.B. tried to escape by sliding his handcuffs in front of him and kicking out the rear window on the driver's side of the police car. Police restrained him.

The district attorney filed another supplemental juvenile delinquency petition against N.B. N.B. admitted to counts of assault by means likely to cause great bodily harm, maiming or abusing an animal, assault upon a police officer, possession of a firearm, and escape from arrest; the district attorney dismissed the remaining charges. N.B. went to the JJC pending disposition proceedings.

While in the JJC and after he turned eighteen, N.B. threatened to have his brother kill the JJC counselors and staff, and his brother was seen armed in the JJC parking lot. The district attorney charged N.B. as an adult for terrorist threats, and he was removed to county jail. He pled guilty to two felonies and two misdemeanors, and the court sentenced him to time served.

The juvenile court held a contested disposition hearing on N.B.'s juvenile wardship petition after his adult convictions, and it committed N.B. to the DJJ with an 11-year maximum period of confinement. N.B. appealed.

DISCUSSION

I. The DJJ Commitment

“ ‘The appellate court reviews a commitment decision for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision.’ [Citation.] ‘A DJJ commitment is not an abuse of discretion where the evidence demonstrates a

probable benefit to the minor from the commitment and less restrictive alternatives would be ineffective or inappropriate.’ ” (*In re A.R.* (2018) 24 Cal.App.5th 1076, 1080–1081.)

A. Background

The probation department’s disposition report recommended that the court dismiss juvenile delinquency proceedings against N.B. and release him to the supervision of the adult probation department. The juvenile probation officer felt that juvenile probation could not provide further services to N.B. and that N.B. had a history of serious offenses and lack of cooperation. The prosecutor urged that N.B. be committed to the DJJ and filed materials describing the DJJ’s services, including education, substance abuse, mental health, and reentry services, as well as intervention strategies.

The defense filed a motion for an alternative dispositional order, submitting a neuropsychological evaluation of N.B.; a social worker’s report documenting the extensive child abuse N.B. suffered and recommending that he be released to an out-of-state residential program or to a program at the Reset Foundation (Reset); evidence of N.B.’s progress in school, including that he had obtained his high school diploma while in county jail and his graduation speech; letters in support of and from N.B.; and N.B.’s Reset application and acceptance letter.

1. The Disposition Hearing

Over the course of many days, the court received testimony from many witnesses.

a. Daniel Macallair

Daniel Macallair, the executive director for 31 years at the nonprofit Center for Juvenile Criminal Justice testified for the defense. He described a 2004 *Farrell*² lawsuit against the DJJ for failure to provide a safe environment, adequate mental health, educational, substance abuse, and sex offender services to juveniles in DJJ custody,

² *Farrell v. Allen* (Super. Ct. Alameda County, No. RG 03079344) was a litigation pursuant to which the state entered into a consent decree in 2004 to develop and implement plans for improving DJJ facilities specifically in the areas of safety and welfare, mental health, education, sexual behavior treatment, health care, dental services, and youths with disabilities. The consent decree was dismissed in February 2016.

which led to court oversight of the DJJ. As of February 25, 2016, the court had terminated its oversight, and Macallair conceded that this indicated the DJJ had adequate staffing for mental health, educational, disability, and substances abuse services. The DJJ's population was 660 at the time of N.B.'s disposition hearing, down from 6,000 at *Farrell's* inception.

Macallair testified that violence levels at the DJJ were very high. He stated that approximately 80 percent of DJJ youths belong to gangs, although he was not able to say how many of these youths became gang-affiliated during incarceration. He opined that the DJJ is more dangerous than local facilities and that sexual assault can be an issue. Regarding mental health, Macallair testified that the DJJ addresses suicide risks immediately, but ongoing therapeutic counseling and intervention is not available in core units that house 80 to 85 percent of youths. Although the DJJ has two dedicated mental health units, they are reserved for psychotic or schizophrenic youths and do not ordinarily treat youths with depression or PTSD. Macallair testified that warders ran resource groups for core-unit youths, such as victim, gang, and substance abuse awareness.

b. Lorraine Custino

DJJ parole agent Lorraine Custino testified that when youths arrive in DJJ custody, they are given physical and mental health assessments to determine immediate needs. Youths normally pass through an intake unit where they receive a medical, psychological, and educational assessment, as well as screening to determine strengths and weaknesses. However, those with immediate mental health needs may be placed directly in a mental health unit.

The lowest level of mental health services that the DJJ offers is outpatient services, where a core-unit youth may request a psychologist and will have medication evaluated by a psychiatrist. Core units have less access to a psychologist, with one psychologist for every two core units; however, because the DJJ's population is low, Custino testified that it is possible for a core-unit youth to request access to a psychologist on a regular basis. Therapy for youths who have experienced trauma is available, and those groups are run by psychologists. The next level of mental health

services the DJJ provides is two mental health units that collectively house up to 48 youths, and a psychologist is always available in these units. The DJJ then has an intensive treatment program for up to 16 youths with counselors and an assigned psychologist. If more care is required, a youth may be transferred to a state mental health hospital.

Every DJJ unit has a treatment team or supervisor who oversees the unit. Specialized units, such as the mental health units, have a casework specialist rather than a parole agent, a youth and senior youth correctional counselor, a supervising case specialist or a treatment case supervisor, and a psychologist. The DJJ is run on an Integrated Behavior Treatment model, and its programs are all evidence-based. Treatment emphasizes “positive interventions and skill building.” The DJJ uses a cognitive behavioral program called “Counterpoint” to address negative peer influences and decisionmaking. It also offers aggression training practices and a substance abuse program. For youths with high school diplomas, correspondence college courses and numerous vocational programs are available. A community reentry plan is made for each youth, and DJJ programming is geared towards rehabilitation and positive community reentry.

To ensure safety, the DJJ keeps the numbers of youths low so there is constant supervision. Individualized treatment plans and crisis intervention plans exist for each youth. Intervention is swift and debriefing and crisis resolution meetings occur to determine the underlying causes of violence or conflict. Staff and visitors are required to wear a personal safety alarm due to the killing of a staff member many years ago; and staff have protective vests, pepper spray, and handcuffs.

c. Rocio Molina

At the time of the disposition hearing, N.B. was on a wait list for Reset. Reset employee, Rocio Molina, testified that Reset began as a day program and in 2016 became a 12- to 18-month residential program that offers an alternative to incarceration for males 18 to 25 from low incomes or diverse racial backgrounds. Reset is a voluntary program with a learning center and a residential facility.

During the first three months at Reset, staff assess mental health, physical health, and educational needs. After that, Reset focuses on employment training, encourages students to finish high school education, and encourages college courses. In the program's last stage, Reset transports the student to daily off-site employment. Reset offers an on-site mental health wellness manager, who had previously been a licensed therapist but is not currently a licensed therapist or psychologist. If a student has a mental health condition, Reset partners with an outside agency to provide counseling or group therapy. Access to a psychiatrist and mental health medication is available through this same agency.

Aside from mild behavioral problems, Reset reports rule violations and safety issues to a student's probation officer. The residential facility is locked down at night and has security personnel. If a student sought to leave, staff would attempt to convince him to stay and would call his probation officer, but the student could leave if he walked away on an outing or was able to get out of the facility's locked doors at night.

d. Dr. Amanda Gregory

Clinical and forensic neuropsychologist Dr. Amanda Gregory discussed her neuropsychological evaluation of N.B. She observed that N.B. had been subject to traumatic child abuse and opined that he suffered from PTSD, persistent depressive disorder, conduct disorder, and mild cannabis use disorder in a controlled environment. N.B. informed Dr. Gregory that he would commit suicide if committed to the DJJ, and she opined that PTSD placed him at risk for misperceiving situations as potential threats and aggressively overreacting. As an example of how PTSD influenced N.B.'s conduct, she referred to N.B.'s shooting of his brother's dog after having been bitten by a police dog.

Dr. Gregory noted that N.B.'s behavior problems had escalated over time, placing himself and others at risk. She opined that he needed PTSD and depression treatment and intervention to address his serious behavior issues. She recommended that N.B. receive consistent psychotherapy—ideally, cognitive behavioral therapy—at least once a week. She also believed N.B. could respond to treatment and observed that he did well

surrounded by professionals who are emotionally attuned, empathetic, and supportive. She believed he would benefit the most from treatment in a calm, supportive environment and would benefit less if he felt threatened or unsafe. She recommended a residential program but felt that treatment in the community might also be possible.

Dr. Gregory also opined that N.B. needed support and structure, and she agreed that he had done well in structured environments, including jail. She agreed that N.B. would benefit from an anger management program, a cognitive behavioral program, a program that builds on aggression interruption training, and an evidence based mental health program that has trauma focused cognitive behavioral treatment. Without treatment, Dr. Gregory opined that N.B. posed a high risk to the community.

e. Christina Powers

Clinical social worker Christina Powers testified that she believed that N.B. was proud of achieving his high school diploma and was future-oriented. If supervised by adult probation, N.B. would be eligible for the Transitional Age Youth program with access to a resource center including mental health and employment services, and he would be subject to a curfew and electronic monitoring.

2. The Dispositional Order

The court reviewed N.B.'s entire juvenile file and stated that it had considered and rejected less restrictive alternatives to a DJJ commitment because, at nearly 19, N.B. was too old for out-of-home placement, and such placement was inappropriate because of his numerous prior failures. At-home juvenile probation was inappropriate because N.B. continually carried firearms, he required intensive structured services, he failed to take advantage of strong mental health programs at prior out-of-home placements, N.B.'s letters to the court demonstrated his lack of self-awareness of his mental health problems, and his positive progress had occurred in highly structured environments. The court rejected termination of the juvenile proceedings with the hope that adult probation would provide N.B. with the services he needed for similar reasons.

After finding that it was necessary to remove N.B. from the custody of his mother, the court stated: "The Court is fully satisfied that the mental and physical conditions and

qualifications of the minor are such as to render it probable that the minor will be benefitted by reformatory, educational, discipline and other treatment provided by the [DJJ].” In making the DJJ commitment, the court expressly considered N.B.’s behavior with prior less restrictive alternatives, the seriousness of his conduct, the need to protect society, the value of imposing discipline and accountability, and N.B.’s need for a structured environment. The court further considered the professional help, intensive counseling, and school programs provided by the DJJ.

B. Probable Benefit from the Placement

Relying on *In re Carlos J.* (2018) 22 Cal.App.5th 1 (*Carlos J.*), N.B. contends that his commitment order must be reversed. He concedes that the People met their initial burden of showing the programs available at the DJJ but argues that, given his submission of evidence establishing the violence at DJJ facilities and the absence of mental health services, the People failed to provide substantial evidence that N.B. would benefit from a DJJ placement.

Carlos J. reaffirmed that an order committing a minor to the DJJ must be supported by substantial evidence demonstrating “ ‘a probable benefit to the minor by a [DJJ] commitment.’ ” (*Carlos J.*, *supra*, 22 Cal.App.5th at p. 6.) This statutory requirement derives from Welfare and Institutions Code sections 734 and 202, subdivision (b). (*Ibid.*) In *Carlos J.*, the minor did not have a substantial juvenile court record and admitted to assault with a firearm and a gang enhancement. (*Id.* at pp. 4, 7.) The probation department recommended commitment to the DJJ, citing the gravity of the offense and indicating gang intervention services were warranted, but it did not mention specific programs at the DJJ that might benefit the minor. (*Id.* at pp. 7–9.) The court followed probation’s recommendation, indicating it could not “ ‘get over the seriousness of the offense’ ” and stating that recent changes at the DJJ allowed it to “ ‘provide additional services’ ” (*Id.* at p. 9.) The Court of Appeal reversed, rejecting the People’s argument that there was a probable benefit from DJJ programs because there was no “evidence in the record of the programs at the [DJJ] expected to be of benefit to appellant.” (*Id.* at p. 10)

Carlos J. is distinguishable. The record here provides evidence of mental health, educational, anger management, behavioral management, and substance abuse services that could provide a probable benefit to N.B. in a structured environment. Dr. Gregory and N.B.’s social worker agreed that N.B. needed structured, long-term services, and Dr. Gregory opined that N.B. posed a high risk without treatment. Macallair testified that therapy was unavailable for core-unit youths, but DJJ parole agent Custino testified that the DJJ could accommodate weekly therapy with a psychologist for a core-unit youth. The evidence showed that the DJJ provides trauma-focused cognitive behavioral treatment, and that it screens for and responds to immediate mental health needs and suicide risks. Although Macallair believed the DJJ was unsafe and gang-ridden, Custino described the DJJ’s safety measures and procedures and believed that a statistic reporting 72% of DJJ youths to be gang members was too high. Finally, as the court noted, less restrictive placements would neither allow N.B. to effectively receive treatment nor protect the community. Substantial evidence demonstrates a probable benefit to N.B. from commitment to the DJJ.

C. Less Restrictive Alternatives

N.B. argues that the record is devoid of evidence that less restrictive alternatives to the DJJ commitment would have been inappropriate. We disagree.

“In order to ensure the necessity of a [DJJ] placement, there must be evidence ‘supporting a determination that less restrictive alternatives are ineffective or inappropriate.’ ” (*Carlos J.*, *supra*, 22 Cal.App.5th at p. 6.) “ ‘[T]he statutory scheme contemplates a progressively more restrictive and punitive series of dispositions starting with home placement under supervision, and progressing to foster home placement, placement in a local treatment facility, and finally placement at the DJJ’ [Citation.] Nevertheless, there is no rule that such a placement cannot be ordered unless less restrictive placements have been attempted, and there is no requirement that the juvenile court expressly state on the record the reasons for rejecting less restrictive placements. [Citations.] Rather, ‘if there is evidence in the record to show a consideration of less restrictive placements was before the court, the fact the judge does not state on the record

his consideration of those alternatives and reasons for rejecting them will not result in a reversal.’ [Citation.] On the other hand, ‘there must be some evidence to support the judge’s implied determination that he sub silentio considered and rejected reasonable alternative dispositions.’ ” (*In re Nicole H.* (2016) 244 Cal.App.4th 1150, 1159.)

The court’s finding that a less restrictive placement would be inappropriate is supported by the evidence. N.B.’s age and prior poor performance in five out-of-home placements made out-of-home placement impractical. Juvenile and adult probation were inappropriate because N.B.’s crimes had escalated in seriousness; he continued carrying firearms; he required intensive structured services, including mental health services; and he posed a high risk to the community without treatment. N.B.’s counsel advocated that he be sent to Reset, but it was a new, voluntary program that N.B. could walk away from. Given this record, the court did not abuse its discretion in finding that less restrictive alternatives, including Reset, were inappropriate.

II. The Shackling Order

Finally, N.B. contends that the court abused its discretion by ordering that he be shackled throughout the disposition hearing. The court did not abuse its discretion, but even if it had, any error was harmless.

“ “[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury’s presence, unless there is a showing of a manifest need for such restraints.” ’ ” (*People v. Miracle* (2018) 6 Cal.5th 318, 346 (*Miracle*).) In a non-jury proceeding, a lesser showing is required. (*People v. Fierro* (1991) 1 Cal.4th 173, 219–220.) The use of physical restraints during a juvenile delinquency proceeding is improper absent some showing of necessity, though manifest need for their use need not be shown. (*In re Deshaun M.* (2007) 148 Cal.App.4th 1384, 1387 (*Deshaun M.*); *Tiffany A. v. Superior Court* (2007) 150 Cal.App.4th 1344, 1357.) Although the required showing is less than what would be necessary in adult criminal proceedings, even in juvenile court “[a] court must not . . . have a general policy of shackling all defendants.” (*Deshaun M.*, at p. 1387.) Physical restraints may be used where necessary due to a defendant’s “nonconforming conduct and behavior.” (*Tiffany A.*, at p. 1359.)

“ “[W]e will not overturn a trial court’s decision to restrain a defendant absent ‘a showing of a manifest abuse of discretion.’ ” [Citation.] To establish an abuse of discretion, defendants must demonstrate that the trial court’s decision was so erroneous that it ‘falls outside the bounds of reason.’ [Citations.] A merely debatable ruling cannot be deemed an abuse of discretion. [Citations.] An abuse of discretion will be ‘established by “a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ ” ’ [Citations.]” (*Miracle, supra*, 6 Cal.5th at pp. 346–347.)

Here, the court made an individualized determination of necessity when deciding to shackle N.B. The court stated that it did not have a general shackling policy. The court found that N.B.’s attempted escape during his May 2016 arrest, his assault on a police officer, and his in-custody threat to have his brother kill the JJC counselors and staff, justified his shackling, but the court allowed N.B.’s writing hand to be unshackled. N.B. displayed nonconforming conduct with his violent escape attempt, assault, and his threat to JJC staff. “The fact that these incidents occurred outside of the courtroom does not diminish their relevance or their support for the trial court’s order.” (*Miracle, supra*, 6 Cal.5th at p. 347.) On this record, the court did not manifestly abuse its discretion.

Moreover, any error in the court’s shackling order would also be harmless. There is no claim or evidence that the shackles hindered N.B. in the disposition hearing or that any of the witnesses observed the shackles. (See *Deshaun M., supra*, 148 Cal.App.4th at pp. 1387–1388 [court’s shackling of a juvenile at a jurisdictional hearing without a finding of necessity was harmless where there was no showing of prejudice to the presentation of the minor’s case or that the restraints were visible to witnesses].) The only prejudice N.B. asserts on appeal is that the shackling reminded the judge of N.B.’s alleged dangerousness. This argument is unpersuasive. We are confident the juvenile court judge was capable of weighing the evidence fairly without being distracted or prejudiced by N.B.’s restraints. (*Solomon v. Superior Court* (1981) 122 Cal.App.3d 532, 537 [finding meritless the argument that handcuffing the defendant to a chair during the preliminary hearing influenced the decision-making process of the judge].)

N.B. has failed to establish that the court's decision to shackle him compels reversal.

DISPOSITION

The juvenile court's dispositional order is affirmed.

BROWN, J.

WE CONCUR:

STREETER, ACTING P. J.

TUCHER, J.